

In adopting its conclusion that any pole owner providing telecommunications services should be counted as an attaching entity for purposes of allocating the costs of non-usable space the FCC stated “this includes pole owners that use only a portion of their physical plant capacity to provide these services...”<sup>25</sup> This statement could be read to imply that if a utility uses any portion of its plant to provide telecommunications service it is considered an attaching entity on its entire system and therefore must be counted as an attaching entity for any pole or conduit on which it has facilities, regardless of whether those facilities are used for telecommunications services or electric service.

EEI and UTC seek clarification that this was not the FCC’s intent. Specifically, clarification is needed that only that utility plant which is actually used for the utility’s provision of telecommunications services is to be counted for purposes of allocating the cost of unusable space. For example, a utility would only be required to count itself as an attaching entity on those poles where the utility actually has attachments used to provide telecommunications services. The utility would not count itself as an attaching entity on the rest of its poles where it does not have attachments to provide telecommunications services. Otherwise, utilities would be required to pay a grossly disproportionate cost for the non-usable space on top of the one-third costs that utilities will always be required to pay. Further, such clarification is consistent with the treatment of utility facilities that are actually used by the utility or its subsidiary to provide telecommunications services under 224(g).<sup>26</sup>

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<sup>25</sup> *R&O* para. 50.

<sup>26</sup> This would also be consistent with the FCC’s suggestions that, when calculating the presumptive number of attaching entities, wireless attachers should be pro-rated because of the relatively small number of poles they might occupy.

## **V. Presumptive Average Number of Attaching Entities**

In order to calculate the costs of non-usable space on a pole, the FCC has adopted a requirement that each utility develop, through the information it possesses, a presumptive average number of attaching entities on its poles based on location (urban, rural, urbanized). However, the FCC's decision fails to account for the fact that the US Census Bureau provides for a great deal of overlap between urban, rural and urbanized areas. Thus it will be difficult to develop these presumptions as envisioned by the FCC. Further, the FCC should not dictate the specific geographic boundaries that need to be included within a given utility's presumption for a particular location. Instead, the FCC should provide the utilities with the flexibility to develop these presumptions in the manner that best suits their specific location and the type of information that they have available. For example, some utilities might need to use data based on their total service territory while others may determine averages based on the cable system's territory (e.g., a particular city or community) or other geographic area. So long as the utility is willing to disclose how it derived the average, the FCC should not dictate the geographic boundaries that a utility must follow to derive the average number of attaching entities.

In addition, the FCC provided no guidance with regard to the issue of who is expected to pay the expense of developing these presumptions. As was widely acknowledged in the comments filed in this and related dockets, most utilities do not have this information readily available or in a format that is easily adaptable to the creation of such presumptions. The FCC should clarify that utilities must be permitted to charge an attaching entity up front for the potentially substantial cost of developing such presumptions.<sup>27</sup> It is reasonable to require the attaching entities to pay such costs because the utility does not routinely keep these records and

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<sup>27</sup> Associated costs for such presumptions would not be contained in accounts that are recognized by the FCC.

would have no need to develop any presumptions absent the request of one or more attaching entities to access the utility's facilities, at "regulated" rates.

The FCC should also clarify whether a utility needs to have such presumptions in place prior to receipt of a request for attachment under the new provisions in 2001. If the utility must develop presumptions prior to receiving actual requests, the utility will in effect be required to expend consumer or shareholder funds for the benefit of unknown parties, with no guarantee of recovery. The Act does not impose such a confiscatory requirement. One possible approach is that these calculations only need to be done if the attaching entity insists on the development of such a presumption. In such case, the expense should be borne by the attaching entity as a type of "make-ready." Finally, if the FCC does require the development of a presumption the Commission should allow a utility to use a preliminary estimate to develop a rate if there is no final presumptive average available.

## **VI. The FCC Needs To Adopt All Of Its Regulations**

Finally, the FCC needs to adopt all of the pole attachment-related regulations together so that the parties are given the ability to assess their rights and obligations. Currently the FCC has adopted pole attachment rules on a piecemeal approach with access rules in one proceeding, and rate elements in two other proceedings. The interrelated nature of these issues necessitates that all of these issues be resolved concurrently otherwise it is impossible for the parties to move forward under the Act. The Administrative Procedure Act requires the FCC to provide the parties with sufficient clarity in its rules to allow them to understand their rights and obligations.

## **VII. Conclusion**

Many of the rules adopted by the FCC to implement the new provisions of § 224(e) governing charges for attachments to utility poles, ducts, conduits and rights-of-way, by

telecommunications companies, fail to accurately apply the Act, reflect the intent of Congress, or adequately protect the valid interests of utilities, their consumers and their shareholders. A critical element in the successful use of negotiations is the implicit assumption that the terms and conditions that the parties negotiate in a contract are binding. In addition, FCC is urged to reconsider its decision not to address the issue of utilizing a forward-looking economic cost pricing methodology.


Regulated pole attachment rates are not necessary for the competitive deployment of wireless infrastructure. The application of 224 to wireless attachments is a violation of the Equal Protection clause of the Constitution. Investor-owned utilities should not be singled-out for rate regulated access to their facilities for wireless siting when all other entities, including the Federal government, are permitted to recover market rates for wireless access.

Cable companies should not be counted as attaching entities for purposes of allocating the costs of non-usable space even though they are not required to pay for this space. Such an interpretation runs counter to the clear language of the statute and places an undue burden on utilities that amounts to an outright unconstitutional taking of property. As with cable operators, ILECS should not be counted as attaching entities for purposes of allocating the non-usable space on a pole. To allow an attaching entity to overlash its facilities without paying additional fees to the utility is to deny the utility compensation for the use of its property and would be unconstitutional under the 5<sup>th</sup> Amendment.


The FCC provided no guidance with regard to the issue of who is expected to pay the expense of developing presumptions with regard to the number of attaching entities on utility facilities. Finally, the FCC needs to adopt all of the pole attachment-related regulations together so that the parties are given the ability to assess their rights and obligations.

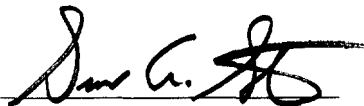
**WHEREFORE, THE PREMISES CONSIDERED,** the Edison Electric Institute and UTC respectfully urge the Commission to take action in a manner consistent with this *Petition for Reconsideration and/or Clarification*.

Respectfully submitted,

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April 13 , 1998

## CERTIFICATE OF SERVICE

I, Melissa Muscio, hereby certify that I have caused to be sent, on this 13th day of April 1998, a copy of the foregoing to each of the following:

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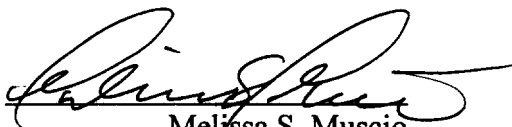
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